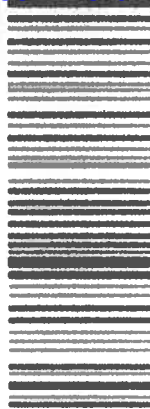


PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

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Alejandro Mayorkas, in his Official Capacity
 as Secretary of Homeland Security
 US Dept of Homeland Security
 2707 Martin Luther King Jr Ave, SE,
 Washington, DC 20528-0485

Sent To

Street, Apt. No.,
or PO Box No.

City, State, ZIP+4

PS Form 3800, June 2002

See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Alejandro Mayorkas, in his Official Capacity
 as Secretary of Homeland Security
 US Dept of Homeland Security
 2707 Martin Luther King Jr Ave, SE,
 Washington, DC 20528-0485



9590 9402 6326 0296 0613 15

2. Article Number (Transfer from service label)

7004 1160 0000 7307 7506

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
 If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
☐ Adult Signature Restricted Delivery
☒ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
- ☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
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PS Form 3811, July 2020 PSN 7530-02-000-9053

Domestic Return Receipt

UNITED STATES DISTRICT COURT

for the
Western District of Texas

The State of Texas

Plaintiff(s)

v.

U.S. Department of Homeland Security, et al.

Defendant(s)

Civil Action No. 2:23-cv-00055

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Alejandro Mayorkas, in his Official Capacity as Secretary of Homeland Security
by registered or certified mail to:
Office of the General Counsel,
US Dept of Homeland Security
2707 Martin Luther King Jr Ave, SE,
Washington, DC 20528-0485

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Ryan D. Walters
Office of the Attorney General
Special Litigation Division
PO Box 12548, Capitol Station
Austin, TX 78711-2548
ryan.walters@oag.texas.gov

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT, PHILIP J. DEVLIN

Date: 10/26/23


Signature of Clerk or Deputy Clerk


AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:23-cv-00055

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION**

THE STATE OF TEXAS,

Plaintiff,

V.

CIVIL ACTION No. 2:23-CV-00055

U.S. DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; U.S. CUSTOMS AND BORDER PROTECTION; TROY A. MILLER, in his official capacity as Acting Commissioner for U.S. Customs and Border Protection; U.S. BORDER PATROL; JASON OWENS, in his official capacity as Chief of the U.S. Border Patrol; and JUAN BERNAL, in his official capacity as Acting Chief Patrol Agent, Del Rio Sector, U.S. Border Patrol,

Defendants.

PLAINTIFF'S ORIGINAL COMPLAINT

I. INTRODUCTION

1. In the midst of an unprecedented immigration crisis at the southern border, federal government officials are, once again, undermining Texas's efforts to stem the flow of illegal immigration.

2. The crisis at the southern border is well known. The Biden Administration's abdication of its duty to secure the border has allowed millions of aliens to illegally cross into Texas and the

United States in record numbers. According to data maintained by the federal government, U.S. Customs and Border Protection (“CBP”) encountered approximately 458,000 aliens at the border in FY2020. That number swelled to over 1.7 million encounters in FY2021 and nearly 2.4 million in FY2022. And the number of “gotaways”—aliens who are detected as making an illegal entry but neither found nor apprehended—increased by 303 percent between FY2019 and FY2022, reaching more than 600,000 in FY2022.

3. But the border crisis is not just limited to harms of this unprecedented influx of unlawful immigration. It also includes deadly drug smuggling, human trafficking, infiltration by suspected terrorists, and other criminal drug cartel activities. To date, in FY2023, CBP has seized over 22,000 pounds of fentanyl—compared with 8,300 pounds over the same period in FY2022. Fentanyl is potentially lethal at a two-milligram dose and is involved in more deaths of Americans under 50 than any other cause of death, including heart disease, cancer, homicide, or suicide. Fentanyl and other drugs are often illegally smuggled into the United States by cartels that operate as transnational criminal organizations—and that have been designated by the Governor of Texas as foreign terrorist organizations. And the organized crime and drug cartels shuttling these drugs daily prey on alien communities and children through human trafficking, violence, extortion, and exploitation.

4. In response, Texas has acted to fill the breach created by the federal government’s indolence. The Governor of Texas declared a border security disaster in 2021 and launched Operation Lone Star, which utilizes multiple state agencies, including the Texas Military Department (“TMD”), to fill dangerous gaps left by the Biden Administration’s failure to secure the U.S.-Mexico border.

5. Among other Operation Lone Star initiatives, TMD has purchased and deployed concertina wire fencing, always with the permission of the landowners, to deter and slow illegal crossings at hot spots along the southern border—including in Eagle Pass, Texas, located in the U.S. Border Patrol’s Del Rio Sector.

6. Recently, Eagle Pass has become the epicenter of this unprecedented alien surge. According to Eagle Pass Mayor Rolando Salinas, Jr., this recent surge is like “nothing that we’ve seen ever, really, to have so many people crossing in without consequence.”¹ After roughly 14,000 people—about half of Eagle Pass’s population—entered the city in less than two weeks, Mayor Salinas declared a state of disaster, which the City Council endorsed the next week.

7. On previous occasions, agents of CBP have cut Texas’s concertina wire barriers placed at strategic border crossing locations. But just as Eagle Pass was being overwhelmed by this alien surge in September and October of 2023, agents of CBP, without any justification, increased this federal practice of cutting, destroying, or otherwise damaging Texas’s concertina wire that had been strategically positioned for the purpose of securing the border and stemming the flow of illegal migration.

8. Since September 20, 2023, federal agents have developed and implemented a policy, pattern, or practice of destroying Texas’s concertina wire to encourage and assist thousands of aliens to illegally cross the Rio Grande and enter Texas. Federal agents not only cut Texas’s concertina wire, but also attach ropes or cables from the back of pickup trucks to ease aliens’ ability to illegally climb up the riverbank into Texas. And they regularly cut new openings in the wire

¹ Gaige Davis, *High Migration Through Texas Border Town of Eagle Pass Strains Resources*, NPR (Sept. 22, 2023), <https://www.npr.org/2023/09/22/1201215460/high-migration-through-texas-border-town-of-eagle-pass-strains-resources>.

fence, sometimes immediately after Texas officers have placed new wire to plug up gaps in fencing barriers.

9. By cutting Texas’s concertina wire, the federal government has not only illegally destroyed property owned by the State of Texas; it has also disrupted the State’s border security efforts, leaving gaps in Texas’s border barriers and damaging Texas’s ability to effectively deter illegal entry into its territory.

10. Texas brings this lawsuit to end this ongoing, unlawful practice which undermines its border security efforts. This Court can and should enjoin the federal defendants from continuing to destroy and damage private property that is not theirs—without statutory authority and in violation of both state and federal law.

II. PARTIES

11. Plaintiff the State of Texas is a sovereign state actively engaged in combatting illegal migration by purchasing, installing, and maintaining concertina wire at hotspots along the southern border, including Eagle Pass, Texas. Texas deploys such wire with the consent of landowners.

12. Defendant the U.S. Department of Homeland Security (“DHS”) is an agency of the United States.

13. Defendant Alejandro Mayorkas is Secretary of DHS. He is sued in his official capacity.

14. Defendant the U.S. Customs and Border Protection (“CBP”) is an agency of the United States and a department of DHS.

15. Defendant Troy A. Miller is the Acting Commissioner for CBP. He is sued in his official capacity.

16. Defendant the U.S. Border Patrol (“USBP”) is an agency of the United States and a department of CBP.

17. Defendant Jason Owens is Chief of the USBP. He is sued in his official capacity.

18. Defendant Juan Bernal is Acting Chief Patrol Agent, Del Rio Sector, USBP. He is sued in his official capacity.

19. On information and belief, DHS, CBP, USBP, and their officers and agents (together, “Defendants”) ordered or participated in the destruction and seizure of Plaintiff’s concertina wire.

III. JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1356 because this case involves federal questions, federal defendants, and seizures of property on land.

21. Venue is proper within this District under 28 U.S.C. § 1391(b)(2) because the events and actions giving rise to this suit occurred in the vicinity of Eagle Pass, Texas.

22. The federal government has waived any immunity for its officers from this suit pressing claims for non-monetary relief under 5 U.S.C. § 702.

IV. FACTUAL BACKGROUND

A. Overview of the Crisis at the Southern border.

23. A crisis of human trafficking, drug smuggling, and terrorist infiltration exists along Texas’s 1,200-mile border with Mexico. For three years, the number of aliens illegally crossing the southern border has ballooned. CBP encountered about 458,000 aliens at the border in FY2020, 1.7 million in FY2021, and 2.4 million in FY2022.² So far in FY2023, CBP has already encountered more than

² OFFICE OF INSPECTOR GENERAL, DEP’T OF HOMELAND SECURITY, OIG-23-24: INTENSIFYING CONDITIONS AT SOUTHWEST BORDER ARE NEGATIVELY IMPACTING CBP AND ICE EMPLOYEES’ HEALTH AND MORALE 6 (May 3, 2023), <https://www.oig.dhs.gov/sites/default/files/assets/2023-05/OIG-23-24-May23.pdf>.

2.2 million.³ Those numbers omit individuals detected as making an illegal entry but neither found nor apprehended (there were more than 600,000 in FY2022) and the “unknown number of aliens who evade detection” entirely.⁴

24. This unprecedented influx of criminal activity along our southern border has had predictable and harmful effects in Texas and across the country.

25. Both Texas citizens and aliens themselves—many of them unaccompanied minors—are often at the mercy of transnational criminal cartels that see illicit activity along the border as good business.⁵ These transnational criminal organizations that ferry violent crime across the Rio Grande daily “have become potent paramilitary forces, with heavily armed mobile units able to stand their ground against the Mexican military.”⁶ One former U.S. Attorney General has stated that the cartels pose security threats that look “more like ISIS than like the American mafia.”⁷ In one recent incident, these non-state actors were able to overwhelm Mexico’s military with “700 cartel paramilitary fighters with armored cars, rocket launchers and heavy machine guns.”⁸ The federal government has chosen to “accept a failed narco-state on our border, providing sanctuary to narco-terrorist groups preying on the American people.”⁹

³ *Southwest Land Border Encounters*, U.S. Customs & Border Protection, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁴ OIG-23-24, *supra* n.2, at 10.

⁵ TODD BENSMAN, *OVERRUN: HOW JOE BIDEN UNLEASHED THE GREATEST BORDER CRISIS IN U.S. HISTORY* 29-32, 193 (2023).

⁶ William Barr, Opinion, *The U.S. Must Defeat Mexico’s Drug Cartels*, WALL ST. J. (Mar. 2, 2023), <https://www.wsj.com/articles/the-us-must-defeat-mexicos-drug-cartels-narco-terrorism-amlo-el-chapo-crenschaw-military-law-enforcement-b8fac731>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

26. These criminal organizations—“the largest, most violent, and most prolific fentanyl trafficking operation in the world”—shuttle illegal narcotics like fentanyl from Mexico into every corner of this country.¹⁰ Although federal officials continue to claim that “Mexico is not a producer of fentanyl,” that country is home to thousands of “illegal laboratories” that in fact manufacture the synthetic drug.¹¹ This year alone, CBP has seized over 22,000 pounds of fentanyl—a synthetic opioid that is lethal at 2mg doses and is now the leading cause of death for Americans under 50.¹² The fentanyl epidemic is now a nationwide problem that reaches far beyond Texas.¹³ Just last month, an infant died after accidentally coming into contact with fentanyl residue at a daycare in New York City.¹⁴

27. In addition to trafficking drugs, Mexican cartels also traffic human beings. “For the first time in history, the cartel proceeds from human smuggling [may] have surpassed those from drug smuggling.”¹⁵ Trafficking across the southern border has changed “from a scattered network of

¹⁰ Press Release, U.S. Department of Justice, Justice Department Announces Charges Against Sinaloa Cartel’s Global Operation (Apr. 14, 2023), <https://www.justice.gov/opa/pr/justice-department-announces-charges-against-sinaloa-cartel-s-global-operation>.

¹¹ Press Release, U.S. Department of State, Remarks at Joint Press Availability in Palacio Nacional (Oct. 5, 2023), <https://www.state.gov/secretary-antony-j-blinken-secretary-of-homeland-security-alejandro-mayorkas-attorney-general-merrick-garland-white-house-homeland-security-advisor-dr-liz-sherwood-randall-mexican-secretary-of-p/>; see DRUG ENFORCEMENT AGENCY, DEA-DCT-DIR-008-20: FENTANYL FLOW TO THE UNITED STATES (Jan. 2020), https://www.dea.gov/sites/default/files/2020-03/DEA_GOV_DIR-008-20%20Fentanyl%20Flow%20in%20the%20United%20States_0.pdf.

¹² Press Release, Chuck Grassley, Feinstein-Grassley Resolution for National Fentanyl Awareness Day Passes Senate (May 18, 2023), <https://www.grassley.senate.gov/news/news-releases/feinstein-grassley-resolution-for-national-fentanyl-awareness-day-passes-senate>.

¹³ *Id.*

¹⁴ Susie Coen, *Baby Boy Dies After Ingesting Fentanyl at New York Nursery*, DAILY TELEGRAPH (Sept. 17, 2023), <https://www.telegraph.co.uk/world-news/2023/09/16/baby-boy-dead-ingesting-fentanyl-new-york-nursery-bronx/>.

¹⁵ BENSMAN, *supra* n.5, at 41.

freelance ‘coyotes’ to a multi-billion-dollar international business controlled by organized crime, some of Mexico’s most violent drug cartels.”¹⁶ Cartels demand thousands of dollars from aliens to facilitate their illegal entry, commodifying them as human “inventory” with “numbered, colored wrist band[s].”¹⁷ Women and children are raped and abused while journeying to the border, only to be trafficked for further sexual violence upon arriving in the United States.¹⁸ Many newly-arrived aliens live in constant fear of visits by cartel members shaking them down for the thousands of dollars they still owe.¹⁹

28. Besides submitting themselves to violence and exploitation at the hands of criminal cartels, geographic perils exist for aliens attempting to illegally cross the border. A record high of 853 aliens died crossing it between October 2021 and October 2022.²⁰ Much of the border passes through the arid Chihuahuan Desert—the largest desert in North America—where aliens risk dying from excessive heat and lack of water.²¹ Other portions of the border pass through the Rio Grande, where

¹⁶ Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html>.

¹⁷ BENSMAN, *supra* n.5, at 32.

¹⁸ See Laura Gottesdeiner et al., *Migrants Are Being Raped at the Mexico Border as they Await Entry to US*, REUTERS (Sept. 29, 2023), <https://www.reuters.com/world/migrants-are-being-raped-mexico-border-they-await-entry-us-2023-09-29/>; Virginia Allen, ‘America’s New Slave Trade’ Is Here at Hands of Mexican Cartels, Border Expert Tells Lawmakers, DAILY SIGNAL (July 19, 2023), <https://www.dailysignal.com/2023/07/19/new-slave-trade-arrived-america-hands-mexican-cartels-border-expert-tells-congress/>.

¹⁹ Tim Hains, *Sen. Katie Britt: What I Saw at the Border Was Not the American Dream, It Was a Nightmare*, REALCLEARPOLITICS (Sept. 27, 2023), https://www.realclearpolitics.com/video/2023/09/27/sen_katie_boyd_britt_what_i_saw_at_the_border_was_not_the_american_dream_it_was_a_nightmare.html.

²⁰ Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in Past 12 Month—a Record High*, CBS NEWS (Oct. 28, 2022), <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/>.

²¹ See Frances Vinall, *More than 100 Migrants Died from Heat Near U.S.-Mexico Border this Year*, WASH. POST (July 7, 2023), <https://www.washingtonpost.com/weather/2023/07/07/migrant-deaths-heat-mexico-border/>.

aliens risk drowning in some stretches with a powerful current.²² A United Nations agency has declared the U.S.-Mexico border the deadliest land crossing in the world.²³

29. Cartel members who cross the border bring violence and crime with them. Law enforcement along the Texas border now regularly engage in high-speed chases with traffickers²⁴ while “‘robberies and violence’ skyrocket in [previously] quiet town[s].”²⁵ Cartels seizing upon an open border have also facilitated the infiltration of terrorists from across the globe. In 2022, the number of border apprehensions of individuals on the FBI’s terrorist watchlist was “500 percent more than in *the prior five years combined*.”²⁶ Put another way, CBP encountered just 6 individuals on the terrorist watchlist in 2018; it encountered 146 of them in 2023.²⁷ Given the hundreds of thousands of “gotaways” who have evaded apprehension, it is impossible to know how many

²² See Santiago Perez & Alicia Caldwell, ‘It’s Like a Graveyard’: Record Numbers of Migrants Are Dying at the U.S. Border, WALL ST. J. (Mar. 17, 2023), <https://www.wsj.com/articles/illegal-immigration-mexico-us-border-deaths-c35cf892>.

²³ Peter Aitken, *UN Migration Study Deems US-Mexico Border ‘Deadliest’ Land Route in the World Based on 2021 Numbers*, FOX NEWS (July 4, 2022), <https://www.foxnews.com/us/un-migration-study-deems-us-mexico-border-deadliest-land-route-world-based-2021-numbers>.

²⁴ Ali Bradley, *Chases Rampant at Southern Border, Plaguing Communities*, NEWS NATION (Mar. 17, 2023), <https://www.newsnationnow.com/us-news/immigration/border-coverage/cartels/southern-border-pursuits/>.

²⁵ Harriet Alexander, *Venezuelan Migrants Are Repelled By Re-installed Razor Wire at Eagle Pass*, DAILY MAIL (Sept. 22, 2023), <https://www.dailymail.co.uk/news/article-12547831/eagle-pass-migrants-razor-wire-venezuelans.html>.

²⁶ BENSMAN, *supra* n.5, at 255-56 (emphasis added); see also *id.* at 258-64; Adam Shaw et al., *Thousands of ‘Special Interest Aliens’ from Middle East Countries Stopped at Southern Border Since 2021: Data*, FOX NEWS (Oct. 10, 2023), <https://www.foxnews.com/politics/thousands-special-interest-aliens-middle-east-countries-stopped-southern-border-2021-data>.

²⁷ MaryAnn Martinez, *Feds Prevented Over 160 People on Terror Watchlist From Crossing US Borders Illegally—Highest Ever Total Recorded: DHS*, N.Y. POST (Sept. 15, 2023), <https://nypost.com/2023/09/15/160-people-on-terror-watch-list-stopped-at-us-border-in-2023/>.

terrorists have already succeeded in passing through the porous southern border and formed terror cells in America.²⁸

B. Operation Lone Star and Concertina Wire

30. In 2021, Governor Greg Abbott declared a border security disaster and launched Operation Lone Star to mitigate the effects of this unprecedented crisis. As part of that initiative, the Governor has:

- a. detailed law enforcement officers to plug border staffing gaps;
- b. heightened vehicle inspections by the Department of Public Safety (“DPS”);
- c. bused aliens who wished to relocate to sanctuary cities in other States, which now recognize the southern border poses a national problem;
- d. constructed miles of border wall after the U.S. ceased construction;
- e. invoked the Texas Disaster Act to enhance penalties for criminal trespass on private land, *see* Tex. Gov’t Code § 418.014; Tex. Penal Code §§ 12.50, 30.05;
- f. designated transnational criminal cartels smuggling drugs, people, and weapons into Texas as foreign terrorist organizations;
- g. deployed floating marine barriers to deter illegal crossings in hotspots along the Rio Grande; and
- h. invoked the Invasion Clauses of the U.S. Constitution, *see* U.S. Const. art. I, § 10, cl. 3; *id.* art. IV, § 4.

²⁸ Andrew Miller, *Hamas Attacks Reminder That Sleeper Cells Are Crossing Southern Border, Expert Warns: ‘They’re Already Here,’* FOX NEWS (Oct. 11, 2023), <https://www.foxnews.com/politics/hamas-attack-reminder-sleeper-cells-crossing-southern-border-expert-warns-theyre-already-here>.

31. These efforts have so far “led to over 477,800 illegal alien apprehensions,” “more than 34,200 criminal arrests, with more than 31,200 felony charges reported,” and “over 428 million lethal doses of fentanyl” seized.²⁹ “Every individual who is apprehended or arrested and every ounce of drugs seized would have otherwise made their way into communities across Texas and the nation.”³⁰

32. In addition to those historic initiatives, Governor Abbott also instructed TMD to deploy concertina wire to deter aliens from making the illegal and dangerous journey across the border into Texas.³¹

33. Concertina wire is a type of barbed wire that is formed in large coils that can be expanded like a concertina, a musical instrument that resembles an accordion. A single roll can span more than 50 feet of distance and connect with other rolls, posts, hinges, and other components to form a continuous fence.

34. Accordingly, concertina wire has long been used to form a secure perimeter around airports, prisons, military bases, government buildings, and other high-security locations. The federal government, for example, deployed concertina wire to create a secure perimeter around the U.S. Capitol and the Supreme Court of the United States in early 2021.³² Even retail stores have

²⁹ Press Release, Office of the Texas Governor, Operation Lone Star Builds More Border Wall To Protect Texans (Sept. 15, 2023), <https://gov.texas.gov/news/post/operation-lone-star-builds-more-border-wall-to-protect-texans>.

³⁰ *Id.*

³¹ Press Release, Office of the Texas Governor, Operation Lone Star Deploys New Border Security Deterrence Strategies (June 9, 2023), <https://gov.texas.gov/news/post/operation-lone-star-deploys-new-border-security-deterrence-strategies>.

³² Zachary Cohen, *US Capitol Police Tells Lawmakers that Razor Wire Fencing Should Remain Until September*, CNN (Feb. 19, 2021), <https://www.cnn.com/2021/02/19/politics/us-capitol-police-fencing-extension-request/index.html>; Marisa J. Lang, *An Increasingly Fortified Federal City*,

begun employing concertina wire “[i]n an effort to combat a wave of retail thefts and smash-and-grab robberies.”³³

35. International borders across the globe are likewise secured with concertina wire.³⁴ India, the world’s largest democracy, has used concertina wire to fence off almost 2,000 miles of its border with Bangladesh.³⁵ The Obama Administration likewise used razor wire along portions of the U.S.-Mexico border.³⁶

36. Coiled razor wire can be quickly deployed to cover a large span of geographical space. As DHS itself acknowledges, once deployed, it effectively “serves as a deterrent” to prevent unauthorized crossings and entry onto restricted property.³⁷ Snags on wire coils slow illegal entries and ease law enforcement apprehension. But the challenge of safely navigating the wire itself often deters trespassers from attempting to cross at all.

WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/us-capitol-fencing/>.

³³ Nancy Loo & Katie Smith, *Retailers Using Metal Coils to Deter Robberies, Nab Thieves*, NEWS NATION (Dec. 15, 2021), <https://www.newsnationnow.com/holidays-on-alert/retailers-using-metal-coils-to-deter-robberies-nab-thieves/>; see also Lisa Fickenscher et al., *Saks Fifth Avenue is Wrapped in Razor Wire to Prevent Looting*, N.Y. POST (June 3, 2020), <https://nypost.com/2020/06/02/saks-fifth-avenue-is-wrapped-in-razor-wire-to-prevent-looting/>.

³⁴ Lorena Iñiguez Elebee, *What Border Walls Look Like Around the World*, L.A. TIMES (Jan. 31, 2017), <https://web.archive.org/web/20170514093140/https://www.latimes.com/world/mexico-americas/la-fg-g-border-barriers-20170130-story.html>.

³⁵ Shahidul Islam Chowdhury, *India Completes Fencing Three-Fourths of Border*, NEW AGE Bangladesh (Sept. 23, 2020), <https://www.newagebd.net/article/117038/india-completes-fencing-three-fourths-of-border>.

³⁶ OFFICE OF INSPECTOR GENERAL, DEP’T OF HOMELAND SECURITY, OIG-17-39: CBP’S BORDER SECURITY EFFORTS – AN ANALYSIS OF SOUTHWEST BORDER SECURITY BETWEEN THE PORTS OF ENTRY 4 (Feb. 27, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-39-Feb17.pdf>.

³⁷ OFFICE OF INSPECTOR GENERAL, DEP’T OF HOMELAND SECURITY, OIG-17-115: MANAGEMENT ALERT – SECURITY AND SAFETY CONCERNS AT BORDER PATROL STATIONS IN THE TUCSON SECTOR 6 (Sept. 29, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-115-MA-092917.pdf>.

37. TMD regularly purchases concertina wire from a variety of vendors to help secure the border, including in the vicinity of Eagle Pass, Texas. Over the past three years, TMD has spent roughly \$11 million to procure more than 70,000 rolls of concertina fencing wire.

38. TMD servicemembers regularly deploy concertina wire along Texas's border with Mexico, including in the vicinity of Eagle Pass, Texas. They obtain consent from landowners before placing any such wire. And they are capable of laying "a quarter mile of triple-strand razor wire each day."³⁸

C. September Alien Surge in Eagle Pass

39. Maverick County—which includes Eagle Pass, Texas—has been particularly affected by the ongoing border crisis.³⁹ In June 2023, Eagle Pass represented nearly 25% of all CBP border encounters.⁴⁰ Seizures there of cocaine, methamphetamine, heroin, fentanyl, and marijuana increased by 7% in June 2023 and 9% in July 2023.⁴¹

40. But those routine and ongoing challenges in Eagle Pass pale in comparison to the massive influx the city saw this fall. Over the second and third weeks of September, almost 14,000 aliens—roughly half the entire population of Eagle Pass—entered the city illegally. On September 20, 2023, more than 4,000 aliens illegally crossed into Eagle Pass in a single day.⁴²

³⁸ Press Release, Texas Military Department, Texas Gets Help With Border, Florida-Tennessee National Guard (June 7, 2023), <https://tmd.texas.gov/ols-weekly-joint-press-release-injects-6-7-2023>.

³⁹ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 85 Fed. Reg. 14,953, 14,953-14,955 (Mar. 16, 2020).

⁴⁰ *Southwest Land Border Encounters (By Component)*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component>.

⁴¹ Press Release, U.S. Customs & Border Patrol, CBP Releases July 2023 Monthly Update (Aug. 18, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2023-monthly-update>.

⁴² MaryAnn Martinez & Jorge Fitz-Gibbon, *Overwhelmed Texas City Declares State of Emergency As*

41. That two-week surge in Eagle Pass is roughly the same as the total number of alien apprehensions for the entire Del Rio Sector for the entire year in each of 2009, 2010, 2011, 2017, and 2018.⁴³

42. This sudden and overwhelming influx of aliens has resulted in what one observer called “complete madness,” straining local resources.⁴⁴ The city’s law enforcement officers have been “overwhelmed” by a spate of crime⁴⁵ and Eagle Pass is home to only a single shelter capable of housing aliens.⁴⁶

43. In response to this massive influx, the Mayor of Eagle Pass issued an emergency declaration under the Texas Disaster Act. On September 19, 2023, Mayor Rolando Salinas, Jr., declared a state of disaster “due to the severe undocumented immigrant surge into the City of Eagle Pass.”⁴⁷

over 11K Migrants—Close to Half Its Population—Surge Across Border, N.Y. POST (Sept. 20, 2023), <https://nypost.com/2023/09/20/eagle-pass-texas-declares-state-of-emergency-over-migrants/>.

⁴³ *Total Illegal Alien Apprehensions By Month*, U.S. BORDER PATROL (Jan. 2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29%201.pdf>.

⁴⁴ See Anna Giaritelli, *Elon Musk Goes to the Border and Leaves Stunned: ‘Complete Madness,’* WASH. EXAMINER (Sept. 29, 2023), <https://www.washingtonexaminer.com/policy/immigration/elon-musk-goes-to-the-border-and-leaves-stunned>; see also Alicia Caldwell & Michelle Hackman, *Migrants Overwhelm Texas City of Eagle Pass*, WALL ST. J. (Sept. 21, 2023), <https://www.wsj.com/politics/policy/migrants-overwhelm-texas-city-of-eagle-pass-531879cf>.

⁴⁵ Alexander, *supra* n.25.

⁴⁶ See Uriel J. Garcia, *Texas Border Cities Scramble to Shelter Thousands of Newly-Arrived Migrants*, TEX. TRIB. (Sept. 21, 2023), <https://www.texastribune.org/2023/09/21/texas-migrants-border-eagle-pass/>.

⁴⁷ City of Eagle Pass (@CityEaglePassTx), X (Sept. 20, 2023, 9:13 AM), <https://twitter.com/CityEaglePassTx/status/1704498968154009806>.

44. On September 26, 2023, the City Council ratified the mayor’s disaster declaration because the alien surge continued to plague the city, stating that it would remain in effect until terminated by the City Council.⁴⁸ The Eagle Pass City Council has not terminated the disaster declaration.

45. Texas had previously “installed razor wire in Eagle Pass to stop illegal crossings.” During the September surge, the Governor of Texas “deployed more Texas National Guard to repel illegal crossings & install more razor wire.”⁴⁹ TMD “reinforced the razor wire barrier, adding new spools to deter entry at the illegal crossing point.”⁵⁰

D. Federal Defendants’ Destruction of Texas’s Wire

46. Federal law tasks DHS and Secretary Mayorkas with, among other things, “[p]reventing the entry of terrorists and the instruments of terrorism into the United States”; “[s]ecuring the borders ... of the United States, including managing and coordinating those functions transferred to [DHS] at ports of entry”; “[c]arrying out the immigration enforcement functions vested by statute,” like Border Patrol operations, detention and removal, and inspections at ports of entry; and consulting with “the heads of State and local law enforcement agencies to determine how to most effectively conduct [immigration] enforcement operations.” 6 U.S.C. §§ 202(1)-(3), 251, 255; *see also id.* § 111(b)(1)(A), (B), (D), (H).

47. Federal law tasks CBP and Acting Commissioner Miller with, among other things, “ensur[ing] the interdiction of persons and goods illegally entering the United States”;

⁴⁸ City of Eagle Pass, *The City of Eagle Pass City Council Ratifies Emergency Declaration*, FACEBOOK (Sept. 27, 2023), <https://www.facebook.com/photo.php?fbid=710818617741865&set=a.632768342213560&type=3>.

⁴⁹ Greg Abbott (@GregAbbott_TX), X (Sept. 20, 2023, 4:54 PM), https://twitter.com/GregAbbott_TX/status/1704614936218149361.

⁵⁰ Keith Griffith, *Eagle Pass Border Standoff*, DAILY MAIL (Sept. 26, 2023), <https://www.dailymail.co.uk/news/article-12563581/Eagle-Pass-border-crisis-Texas-National-Guard.html>.

“detect[ing], respond[ing] to, and interdict[ing] terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States;” “safeguard[ing] the borders of the United States”; and “enforc[ing] and administer[ing] all immigration laws.” *Id.* § 211(c)(2), (5), (6), (8).

48. Federal law tasks USBP and Chief Owens with, among other things, “serv[ing] as the law enforcement office of [CBP] with primary responsibility for interdicting persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States at a place other than a designated port of entry”; “deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband”; and “carry[ing] out other duties and powers prescribed by the Commissioner” of CBP. *Id.* § 211(e)(3)(A)-(B).

49. When it comes to fencing along the border, federal law instructs that DHS “shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective.” Pub. L. 110-161, div. E, title V, §564(a), Dec. 26, 2007, 121 Stat. 2090.⁵¹ And when it first assigned immigration and border functions to DHS, Congress instructed that it “should be a priority for the Secretary” to complete a “14-mile border fence project” near San Diego, California. 6 U.S.C. § 256.

50. The federal Defendants, however, have taken deliberate steps not to police the Nation’s southern border. They have taken additional steps to undercut any State that tries to secure its own border, which the federal government has itself abandoned.

⁵¹ See also Pub. L. No. 109-367, §§ 2(a)(2), 3, 120 Stat. 2638, 2638-2639 (2006).

51. TMD servicemembers routinely record and report noteworthy or suspicious incidents to TMD's chain of command, including incidents of anyone damaging state property or tampering with border infrastructure.

52. In the first half of this year, TMD documented at least 20 incidents when CBP officials seized and damaged Texas's wire fencing by cutting it. On various occasions from January 2023 through August 2023, CBP officials cut Texas's concertina wire to admit aliens illegally entering Texas through the fence hole created by CBP's destruction of state property.

53. In response to reporting in June that showed footage of "Border Patrol cutting through razor wire placed by the state of TX to allow aliens to enter & be processed,"⁵² "a CBP spokesperson" stated that federal officials were entitled to destroy state property to admit illegal aliens anytime they had already effectuated an illegal crossing of the international border.⁵³

54. CBP's damage to Texas's concertina wire accelerated in September and October, just as the sudden influx of aliens was surging into Eagle Pass.

55. On September 20, 2023, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 8:51 AM, admitting more than 1,200 aliens through the hole.

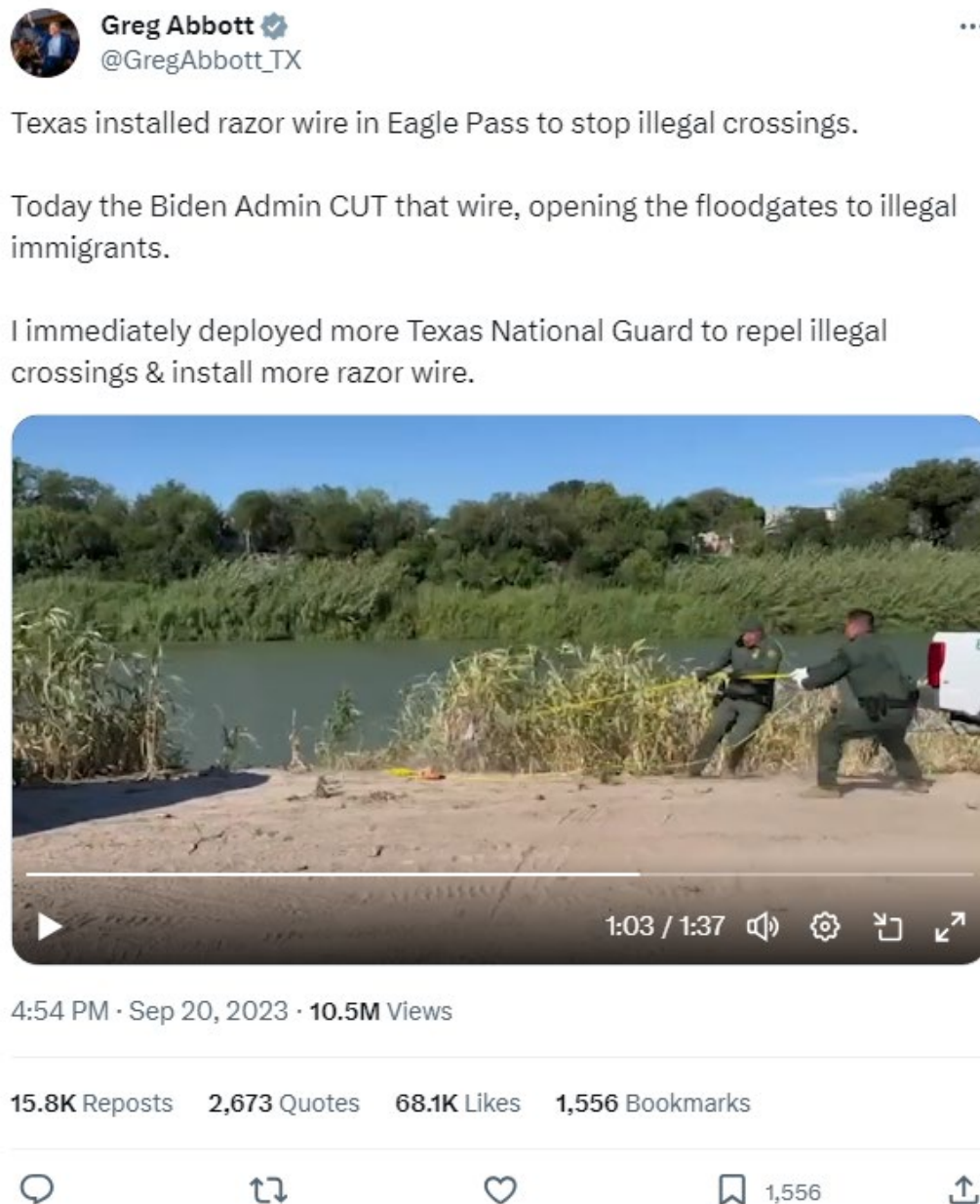
56. That same day, the Governor of Texas publicly explained in a statement on X that Texas had "installed [the] razor wire in Eagle Pass to stop illegal crossings." Federal officers, however, "CUT that wire" to "open[] the floodgates to illegal immigrants." In response, the Governor

⁵² Bill Melugin (@BillMelugin_), X (June 30, 2023, 1:35 PM), <https://twitter.com/BillMelugin/status/1674849236448313372>.

⁵³ Bill Melugin (@BillMelugin_), X (June 30, 2023, 6:23 PM), <https://twitter.com/BillMelugin/status/1674921617661591553>.

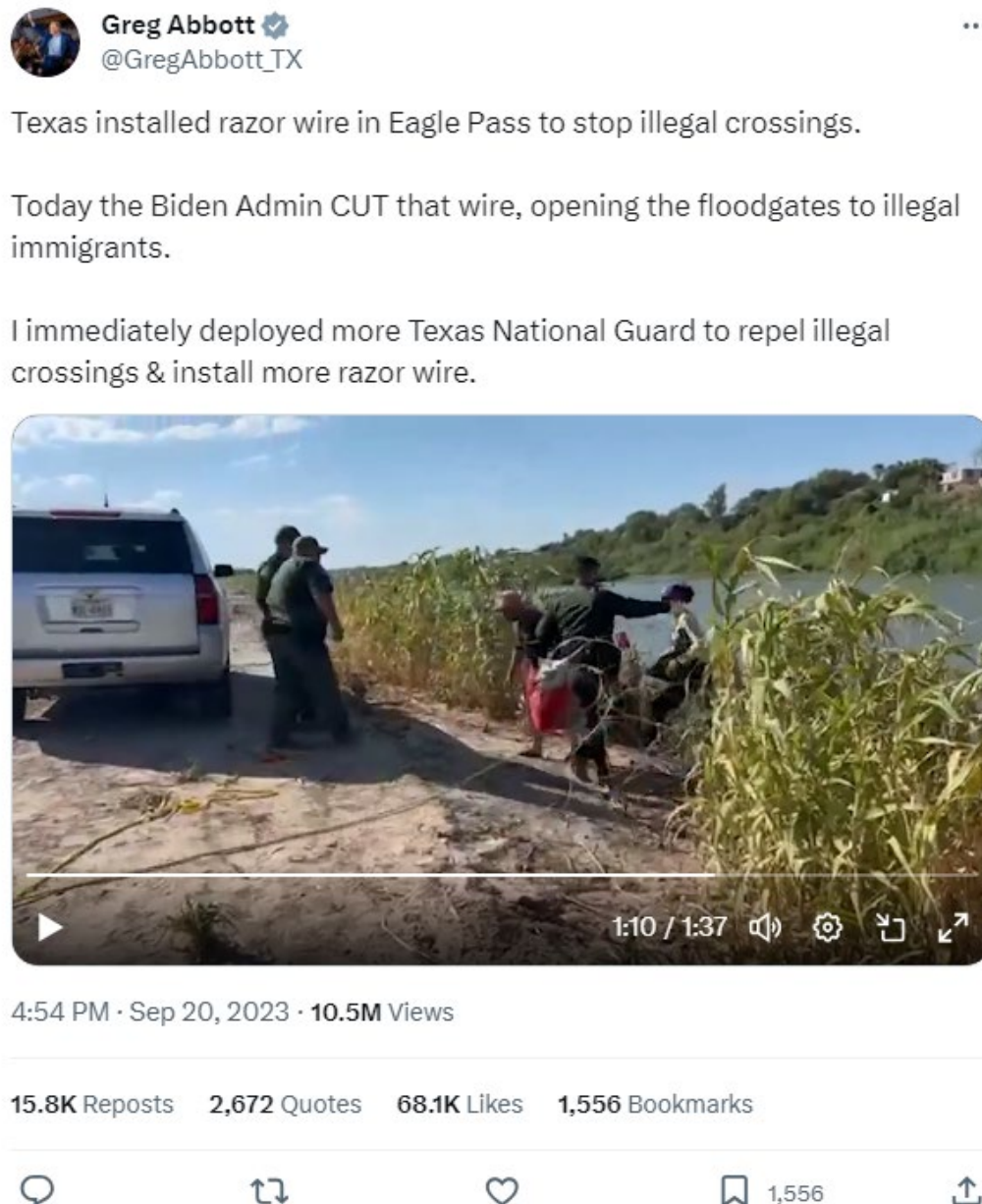
announced that he “immediately deployed more Texas National Guard to repel illegal crossings & install more razor wire.”⁵⁴

57. This post—which has since been viewed more than 10 million times—included an embedded video from earlier that same day showing CBP officials tearing Texas’s fence apart:



⁵⁴ Abbott, *supra* n.49.

The video also shows CBP officials waving aliens up the riverbank:



58. Defendants did not cease their destruction of state property. Instead, they doubled down on their policy, pattern, or practice of destroying Texas's wire fence. TMD has documented CBP officials seizing and damaging Texas's wire fence by cutting openings more times since September 20 than in the prior eight months combined.

- a. On September 21, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 4:52 AM, admitting an unknown number of aliens through the hole.
- b. On September 23, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 5:53 PM, admitting 30 aliens through the hole.
- c. On September 24, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 1:05 PM, admitting 186 aliens through the hole.
- d. On September 26, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 1:40 PM, admitting an unknown number of aliens through the hole.
- e. On September 27—
 - i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 2:47 PM, admitting 94 aliens through the hole.
 - ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 3:25 PM, admitting an unknown number of aliens through the hole.
- f. On September 28—
 - i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 7:23 AM, admitting 72 aliens through the hole.
 - ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 10:04 AM, admitting 32 aliens through the hole.
 - iii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 11:20 AM, admitting more than 30 aliens through the hole.
 - iv. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 1:55 PM, admitting an unknown number of aliens through the hole.

g. On September 29—

- i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 6:00 AM, admitting an unknown number of aliens through the hole.
- ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 4:12 PM, admitting 35 aliens through the hole.

h. On September 30—

- i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 9:14 AM, admitting 232 aliens through the hole.
- ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 1:30 PM, admitting an unknown number of aliens through the hole.
- iii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 2:35 PM, admitting an unknown number of aliens through the hole.
- iv. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 4:37 PM, admitting an unknown number of aliens through the hole.

i. On October 1, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 11:00 AM, admitting an unknown number of aliens through the hole.

j. On October 2—

- i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 11:11 AM, admitting an unknown number of aliens through the hole.
- ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 2:55 PM, admitting an unknown number of aliens through the hole.

k. On October 6—

- i. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 12:45 PM, admitting an unknown number of aliens through the hole.
 - ii. CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 5:25 PM, admitting an unknown number of aliens through the hole.
- l. On October 10, CBP officials cut Texas's concertina wire near Eagle Pass, Texas, at 11:40 AM, admitting an unknown number of aliens through the hole.

59. Since September 20, then, CBP has seized and damaged Texas's concertina wire to escort aliens into Texas more than 20 times. On each of these occasions, CBP has entered onto state, municipal, or private land to destroy state property. Plaintiff has not placed concertina wire on any federal land near Eagle Pass.

60. Defendants have a policy, practice, or pattern of seizing, damaging, and destroying Texas's personal property by cutting, severing, and tearing its concertina wire fence to introduce breaches, gaps, or holes in the barrier. It has authorized its officials or agents to engage in this conduct anytime an alien has managed to illegally cross the international border in the Rio Grande to process that alien in the United States.

61. Defendants' wire-cutting policies are pervasive and widespread. And they are largely implemented by higher level CBP leadership, rather than lower level officers, who regularly refuse to destroy or damage Texas's border infrastructure.

62. CBP's routine act of seizing and cutting Texas's concertina wire destroys its utility as a barrier fence, as evidenced by CBP's ability to usher large numbers of aliens through breaches made in the fence.

63. As a result of Defendants’ destruction of concertina wire, Plaintiff has suffered and continues to suffer harm and a real and immediate threat of repeated injury in the future. Plaintiff owns the concertina wire that has been placed in border locations and Defendants’ repeated destruction of Plaintiff’s property has diminished Texas’s efforts to secure the border, increasing its costs for providing healthcare, public education, incarceration, and driver’s licenses.

64. Defendants have no statutory authority or other privilege to seize and damage Texas’s wire fence by cutting breaches. Defendants routinely damage Texas’s fence with no apparent need to administer emergency response to an alien in distress. The concertina wire does not prevent officials from providing water or other nourishment to aliens on the other side of the fence, and law enforcement continue to operate boats in the river.

65. Defendants have no statutory authority or other privilege to hold open the breaches in Texas’s wire fence after seizing and damaging it. Even if Defendants have cut Texas’s wire fence on some occasions to aid an individual migrant in urgent distress, Defendants routinely refuse to repair the damages to Texas’s wire fence promptly after any exigency has dissipated, instead broadening breaches or leaving them open for hundreds of other aliens to enter illegally.

V. CLAIMS FOR RELIEF

COUNT 1

Common Law Action for Conversion

61. Texas law furnishes a cause of action for conversion for wrongfully exercising dominion over the private property of another. *Pan Am. Petroleum Corp. v. Long*, 340 F.2d 211, 219-220 (5th Cir. 1964).

62. Plaintiff has a proprietary interest in the concertina wire fencing purchased with state funds.

63. Plaintiff's concertina wire fence is personal property that is lawfully in place on state, municipal, or private land.

64. Defendants have intentionally and repeatedly intermeddled with, destroyed, or otherwise exercised dominion over Plaintiff's concertina wire fencing in the past by seizing and cutting it.

65. Defendants continue to intermeddle with, destroy, or otherwise exercise dominion over Plaintiff's concertina wire fencing by seizing and cutting it on a regular basis.

66. Defendants' policy, pattern, or practice of intermeddling with Plaintiff's concertina wire has caused actual damage, destroying the wire's utility as a barrier fence and depriving Plaintiff of its use for a substantial time.

67. Defendants' repeated and ongoing conversion of state property may be remedied by preliminary and permanent injunctive relief.

COUNT 2

Common Law Action for Trespass to Chattels

68. Texas law furnishes a cause of action for trespass to chattels for wrongfully exercising dominion over the private property of another. *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981).

69. Plaintiff has a proprietary interest in the concertina wire fencing purchased with state funds.

70. Plaintiff's concertina wire fence is personal property that is lawfully in place on state, municipal, or private land.

71. Defendants have intentionally and repeatedly intermeddled with, destroyed, or otherwise exercised dominion over Plaintiff's concertina wire fencing in the past by seizing and cutting it.

72. Defendants continue to intermeddle with, destroy, or otherwise exercise dominion over Plaintiff's concertina wire fencing by seizing and cutting it on a regular basis.

73. Defendants' policy, pattern, or practice of intermeddling with Plaintiff's concertina wire has caused actual damage, diminishing the wire's utility as a barrier fence and depriving Plaintiff of its use for a substantial time.

74. Defendants' repeated and ongoing trespass to state chattels may be remedied by preliminary and permanent injunctive relief.

COUNT 3
5 U.S.C. § 706(2)(C): Acts in Excess of Statutory Jurisdiction

75. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

76. No statute authorizes Defendants to destroy and seize border infrastructure belonging to another sovereign in order to facilitate unlawful entry of aliens into the United States.

77. Defendants have "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. § 1103(a)(5).

78. The power to "control and guard the boundaries and borders of the United States against the illegal entry of aliens" does not include the power to destroy and seize concertina wire that controls and guards the boundary and border against illegal entry of aliens.

79. Defendants have the power, without a warrant, "within a distance of twenty-five miles from any such external boundary" of the United States, "to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States[.]" 8 U.S.C. § 1357(a)(3).

80. The power “to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States” does not include the power to cut concertina wire that prevents the illegal entry of aliens into the United States.

81. Moreover, Defendants are violating statutory authority.

82. Defendants have “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens.” 8 U.S.C. § 1103(a)(5).

83. When Defendants destroy and seize Texas’s concertina wire, they violate their duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens.

84. A person who “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law” commits a crime. 8 U.S.C. § 1324(a)(1)(A)(ii). Defendants’ destruction and seizure of Plaintiff’s concertina wire would be a crime under that provision if committed by a private actor because it permits and allows the movement and transportation of aliens who have illegally entered into the United States within the United States.

85. A person who “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law” commits a crime. 8 U.S.C. § 1324 (a)(1)(A)(iv). Defendants’ destruction and seizure of Plaintiff’s concertina wire would be a crime under that provision if committed by a private actor because it encourages and induces aliens to illegally cross the Rio Grande to the north bank, assured that the federal government will allow them into the rest of Texas and the United States.

86. Moreover, federal law tasks Defendants with “ensur[ing] the interdiction of persons and goods illegally entering the United States”; “detect[ing], respond[ing] to, and interdict[ing] terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States;” “safeguard[ing] the borders of the United States”; and “enforc[ing] and administer[ing] all immigration laws.” 6 U.S.C. § 211(c)(2), (5), (6), (8); *see also id.* § 211(e)(3).

87. Defendants’ policy, pattern, or practice of seizing and destroying Plaintiff’s concertina wire fencing, which serves as a border barrier, is without legal authority and exceeds any statutory jurisdiction or authorization.

88. Destroying and seizing Plaintiff’s concertina wire is final agency action. 5 U.S.C. § 551(13), (10)(D).

89. Defendants’ actions in excess of statutory authority have harmed and continue to harm Plaintiff’s interest in personal property.

COUNT 4 **5 U.S.C. § 706(2)(D): Failure to Observe Required Procedures**

90. The Administrative Procedure Act directs federal courts to set aside agency action that is taken “without observance of procedure required by law.”

91. Defendants’ policy, pattern, or practice of seizing and destroying Plaintiff’s concertina wire fencing, which serves as a border barrier, is a substantive rule.

92. Defendants’ decision to implement that substantive rule without submitting it to notice and comment did not observe the procedure required by law.

COUNT 5

5 U.S.C. § 706(2)(A): Arbitrary and Capricious

93. The Administrative Procedure Act directs federal courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

94. Plaintiff’s concertina wire fencing serves as a border barrier to illegal entry.

95. Defendants have recently recognized the urgent need to erect and maintain border infrastructure.

96. Defendants’ policy, pattern, or practice of seizing and destroying Plaintiff’s concertina wire fencing while recognizing the need to for such infrastructure is arbitrary and capricious.

97. Defendants’ policy, pattern, or practice of seizing and destroying Plaintiff’s concertina wire fencing while federal law tasks it with constructing and maintaining such infrastructure is contrary to law.

COUNT 6

Ultra Vires Non-Final Agency Action

98. In the alternative, if Defendants’ destruction and seizure of Plaintiff’s concertina wire is not final agency action, it is *ultra vires* action.

99. The agency action irreparably harms Plaintiff, and Plaintiff’s injuries are in the zone of interests sought to be protected by the APA.

100. Plaintiff seeks non-monetary injunctive and declaratory relief.

101. Therefore, the APA waives Defendants’ sovereign immunity to Plaintiff’s *ultra vires* claims. *Apter v. Dep’t of Health & Human Services*, 80 F.4th 579 (5th Cir. 2023).

VI. DEMAND FOR RELIEF

Plaintiff respectfully requests that the Court:

- i. Preliminarily and permanently enjoin Defendants from seizing and destroying Plaintiff's concertina wire fencing and maintaining breaches in said fencing.
- ii. Stay agency action under 5 U.S.C. § 705 and set aside (*i.e.*, vacate) Defendants' policy, pattern, or practice of seizing and destroying Plaintiff's concertina wire fencing.
- iii. Declare that Defendants' destruction and seizure of Plaintiff's concertina wire fencing is unlawful.
- iv. Award costs and such other relief as the Court deems equitable and just.

Dated: October 24, 2023.

Respectfully submitted.

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